Nos. 77-1575, 77-1648 and 77-1662

In the Supreme Court of the United States

OCTOBER TERM, 1978

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
PETITIONERS

v.

MIDWEST VIDEO CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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INDEX

CITATIONS

Cases:

Cases—Continued

Constitution, statutes and regulations:

Constitution, statutes and regulations—Continued

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A.)[1] is reported at 571 F.2d 1025. The orders of the Federal Communications Commission (Pet. Apps. B and

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* Together with No. 77-1648, *American Civil Liberties Union* v. *Federal Communications Commission et al.*, and No. 77-1662, *National Black Media Coalition, et al.* v. *Midwest Video Corporation, et al.*

[1] "Pet. App." refers to the appendix to the petition in No. 77-1575.

C) are reported at 59 F.C.C. 2d 294 and 62 F.C.C. 2d 399.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 1978. The petition in No. 77-1575 was filed on May 4, 1978; the petition in No. 77-1648 was filed on May 19, 1978; and the petition in No. 77-1662 was filed on May 22, 1978. Jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission has statutory authority to promulgate rules requiring certain cable television systems (1) to have the capacity to provide at least 20 channels; (2) to provide access to third parties on channels or parts of channels not being used by the system for its regular services, and (3) to make available certain equipment and facilities to those third parties.

2. If so, whether such rules are consistent with the First and Fifth Amendments.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The First and Fifth Amendments are set forth at the end of the Commission's petition. The pertinent statutory provisions are set forth at Pet. App. E, pp. 209-211. The pertinent regulations are set forth at 47 C.F.R. 76.252 *et seq.* and Pet. App. B, pp. 168-176; Pet. App. C, pp. 202-203.

STATEMENT

The history and details of the complex rules established by the Federal Communications Commission's

Report and Order in Docket 20508, 59 F.C.C. 2d 294 (Pet. App. B) (*"1976 Report"*) are fully set forth in the *1976 Report*, the opinion of the court of appeals (Pet. App. A), and the petitions filed to review the court of appeals' judgment. We summarize only some aspects of particular significance to the present petitions that may not be readily apparent in the foregoing documents.

1. The 1976 Report.

Although the court of appeals focused almost exclusively on the third-party access rules, the *1976 Report* promulgated three related but distinct groups of rules—(1) channel capacity rules, (2) access rules, and (3) equipment availability rules. While all of these serve related objectives, in our view each group presents substantially different considerations for purposes of statutory and constitutional analysis.

The channel capacity rules generally require cable systems with 3,500 or more subscribers—only a part of all present cable systems—to have the capacity to provide 20 different channels over which the cable operator can transmit communications. To minimize the burdens of requiring reconstructing of existing systems with lesser capacity, the Commission in the *1976 Report* repealed its previously established 1977 deadline and permitted most existing systems until 1986 to comply, in order to allow most reconstruction to occur in the course of normal rebuilding or replacement (Pet. App. B, pp. 148-161).[2] The capacity

[2] Furthemore, the Commission declined to impose any requirement that a system operator install equipment enabling the reception of 20 channels by his subscribers, most of whom,

rules also require cable systems to develop a capacity for two-way nonvoice communications (Pet. App. B, pp. 124-134).[3]

As we read the *1976 Report*, the access rules provide, in effect, that a cable system must allow four groups (the public, educational authorities, local governments, and paying lessors) to use available channels of the system that are not being used by the system for its own broadcast retransmission or origination services (Pet. App. B, pp. 139-143, 169-171). Thus, the rules do not require the system to displace its own existing services in favor of providing access with the possible exception of the system's automated time and weather services (Pet. App. B, p. 143, n. 19; see n. 10, *infra*). The rules also permit the system operator to combine access services on the same channel where demand permits; thus, if demand for access services can be satisfied on one channel, the rules permit the operator to provide only one channel for those purposes (Pet. App. B, pp. 140-141, 170).[4]

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without such equipment, can receive only 12 cable channels on their television sets (Pet. App. B, pp. 132-138).

[3] Two-way nonvoice communication facilities permit a subscriber to communicate with the cable system. Such systems have not yet been greatly developed, but the technical possibilities include systems whereby a subscriber may order and receive books, visual materials or other information on his television set (see, generally, Pet. App. B, pp. 124-131).

[4] The rules present a number of other questions concerning the administration of the access rules that are not in our view clearly resolved by the *1976 Report*. The *1976 Report* acknowledges that fact (Pet. App. B, p. 148):

> [T]he administration of the composite access channel approach will undoubtedly present many difficulties. We shall, after some experience with these new rules has been gathered, issue a primer on various matters respecting our access channel obligations by which we hope to further clarify our position on these matters. We shall also administer our approach in a flexible manner and shall not hesitate to revisit this entire area should our experience dictate that our public interest goals are not being met.

The equipment availability rules provide that each system of 3,500 or more subscribers "shall have available equipment for local production and presentation of cablecast programs other than automated services and permit its use for the production and presentation of public access programs" (Pet. App. B, p. 172). They also provide that for programs exceeding five minutes in length the system operator can impose reasonable charges for "equipment, personnel, and production of public access programming." 47 C.F.R. 76.256(c)(3); Pet. App. B, p. 173.

2. The Court of Appeals Opinion.

The court of appeals held, first, that all the rules promulgated by the *1976 Report* exceeded the Commission's statutory authority. The basis for that conclusion is not clear (see Pet. App. A, pp. 20-64). The court appears to have concluded that, regardless of the objectives of the rules, they were not reasonably ancillary to the Commission's jurisdiction over television broadcasting, and therefore exceeded the jurisdictional limits imposed by this Court in *United States* v. *Midwest Video Corp.*, 406 U.S. 649, and *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, be-

cause they imposed burdens on cable systems that the court believed to be excessive and of doubtful merit and that the Commission had not imposed on television broadcasters.

Having held the rules to have been beyond the Commission's jurisdiction, the court of appeals expressed at some length its view that the rules in any event would violate the First and Fifth Amendments (Pet. App. A, pp. 64-82) although the court expressly declined to rest its decision on constitutional grounds (*id.* at 64). The court concluded that the rules would deprive cable operators of control of communications transmitted on their facilities in violation of the First Amendment principles set forth in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (Pet. App. A, pp. 71-74) and that they also imposed upon cable operators impermissible censorship obligations with respect to indecent or obscene materials (*id.* at 75-77). The court also "suggested" (*id.* at 77, 78-79) that the rules constituted a taking of property for public use without compensation in violation of the Fifth Amendment.

Finally, the court, also without deciding, raised a number of questions about the adequacy of the Commission's rationale and the record support for its rules, and stated (Pet. App. A, p. 91) that "it is at best doubtful that a court could avoid finding [the record] reflective of agency action arbitrary and capricious."

3. The Petitions.

The Commission, petitioning in No. 77-1575, seeks this Court's review of the court of appeals' jurisdictional and constitutional rulings. The Commission does not, however, seek review of the court's invalidation of those provisions in the rules requiring cable operators "to exercise prior restraint of obscenity [or indecency]" over access channels (Pet. App. A, p. 72, n. 73, 75-77) since the Commission itself has instituted a review of those provisions. See Pet. No. 77-1575, pp. 15-16, n. 15.

Petitioners in No. 77-1662, *National Black Media coalition, et al.*, also seek review of the court of appeals' jurisdictional and constitutional rulings and generally support the Commission's position on those issues.

Petitioner in No. 77-1648, the *American Civil Liberties Union*, seeks review of the jurisdictional and constitutional issues, and also presents as an issue for review (Pet. No. 77-1648, p. 3), without further discussion or argument, "[w]hether [the *1976 Report*], insofar as it retreated irrationally and without justification from the channel capacity and access requirements of the 1972 Report, should be set aside as arbitrary, capricious, and contrary to constitutional right."

DISCUSSION

We support the Commission's petition for a writ of certiorari. We agree with the Commission that the court of appeals erred in holding that the Commission

exceeded its jurisdiction and in concluding that the rules would violate the First Amendment and in suggesting that they would violate the Fifth Amendment. We also agree with the Commission that the jurisdictional and constitutional questions are important and warrant this Court's review.

1. The court of appeals' conclusion that the Commission's rules exceeded its jurisdiction cannot be reconciled with this Court's decisions in *Midwest Video Corp.*, *supra*, and *Southwestern Cable Co.*, *supra*. In those cases this Court established that the basic source of the Commission's regulatory jurisdiction over cable television is Section 2(a) of the Communications Act, 48 Stat. 1064, as amended, 47 U.S.C. 152(a), which provides in pertinent part: "The provisions of this [Act] shall apply to all interstate and foreign communication by wire or radio." The Court emphasized that Section 2(a) gives the Commission broad and comprehensive powers over "all interstate * * * communication by wire or radio." *Midwest Video Corp.*, *supra*, 406 U.S. at 660-661; *Southwestern Cable Co.*, *supra*, 392 U.S. at 172-173.

In both cases, the Court found it unnecessary to decide the outer limits of the Commission's powers under Section 2(a) to regulate cable television because it concluded that the Commission's jurisdiction at least included powers that are "reasonably ancillary to the effective performance of [its] various responsibilities for the regulation of television broadcasting" (*Southwestern Cable*, *supra*, 392 U.S. at 178; *Midwest Video*, *supra*, 406 U.S. at 662-663) and that the rules at issue in those cases were reasonably ancillary to those responsibilities.

The elucidation and application of those principles in *Midwest Video* are controlling in this case. In *Midwest Video*, the Court upheld the Commission's jurisdiction to establish rules requiring cable systems to originate their own programs. The plurality opinion explained that the concept of "reasonably ancillary" jurisdiction is not limited to the establishment of rules designed to protect broadcasting stations, but "extends also to requiring CATV affirmatively to further statutory policies" (406 U.S. at 644), and, in particular, extends to rules designed to " 'further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services * * *' " (*id.* at 667-668).[5]

The channel capacity, access and equipment availability rules established by the *1976 Report* are designed to serve the very same statutory policies that the Court in *Midwest Video* held established the basis for the Commission's jurisdiction. For purposes of the Commission's jurisdiction, we can see no ground for distinguishing the rules at issue here from those

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[5] Cf. *Federal Communications Commission* v. *National Citizens Committee for Broadcasting*, No. 76-1471, decided June 12, 1978, upholding the Commission's rules prospectively prohibiting common ownership of broadcast stations and newspapers in the same community.

upheld in *Midwest Video*. The mandatory origination rules had no closer nexus to the services provided by broadcasters than the capacity, access and equipment rules; rather both were designed to require cable systems themselves " 'affirmatively to further statutory policies' " (406 U.S. at 664).

Indeed, to the extent that they differ, the rules here would seem to fall more clearly within the jurisdiction recognized by all of the Members of the Court in *Midwest Video*. The principal objection of the four dissenting Justices in that case was to the fact that mandatory origination rules imposed on cable operators functions and responsibilities entirely different from those which they had chosen to undertake. *Midwest Video*, *supra*, 406 U.S. at 677-681 (dissenting opinion). The dissenting opinion emphasized that "CATV is simply a carrier having no more control over the message content than does a telephone company" (*id.* at 680), and concluded that requiring such carriers to engage in program origination was so extreme a step that it should be left to Congress. The rules here, in contrast, impose carriage responsibilities that are not substantially different from cable television's traditional and chosen functions.[6]

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[6] Since the decision in *Midwest Video*, Congress has acted in several ways to confirm this Court's conclusion that the Commission's regulation of cable television is congressionally authorized. In the Federal Election Campaign Act of 1971, 86 Stat. 3, 7, enacted in 1972, Congress amended Section 315 of the Communications Act, 48 Stat. 1088, as amended, 47 U.S.C. (Supp. V) 315, which imposes on broadcasting stations equal time and fairness obligations, to provide in Section 315(c):

> For purposes of this section—
>
> (1) the term "broadcasting station" includes a community antenna television system; and
>
> (2) the terms "licensee" and "station licensee" when used with respect to a community antenna television system mean the operator of such system.

Most recently, in Pub. L. 95-234, 92 Stat. 33 (February 21, 1978), Congress amended 47 U.S.C. 503(b) to provide for forfeiture penalties for persons who willfully fail to comply with the terms and conditions of any "license, permit, certificate, or other instrument or authorization issued by the Commission"; the amendment expressly applies the penalty provisions to common carriers, broadcast licensees and "cable television operator[s]." Those actions confirm Congress' understanding that the Commission is to regulate cable television systems, and certainly do not reflect any congressional objection to the principle of imposing access obligations on such systems.

In short, the court of appeals' jurisdictional conclusion is contrary to the principles established in *Midwest Video* and *Southwestern Cable*. It is also contrary to the decision of the Ninth Circuit in *American Civil Liberties Union* v. *Federal Communications Commission*, 523 F. 2d 1344, upholding the first access regulations promulgated by the Commission in 1972.[7]

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[7] It is difficult to discern the precise basis of the court's jurisdictional conclusion in this case. The court appears to have concluded that the objectives of the rules are largely irrelevant to the jurisdictional issue (see Pet. App. B, pp. 28, 32-39, 46-48), but that conclusion is plainly at odds with *Midwest Video*. Beyond that, the court's holding appears to be based on its views that the access rules are unduly burdensome and unwise (*id.* at 44-50), that they constitute impermissible common carriage regulations (*id.* at 59-64), and

that the Commission did not and could not impose the same kind of regulations on broadcasters (*id.* at 54-59).

None of those views, even if correct, supports the court's jurisdictional holding. The wisdom of the rules and the assessment of their costs and benefits are matters for the Commission to decide; a reviewing court is limited to determining whether the Commission's rules are within its statutory jurisdiction to adopt and whether they are arbitrary or capricious —*i.e.*, whether they are "not rational and based on consideration of the relevant factors." *Federal Communications Commission* v. *National Citizens Committee for Broadcasting*, No. 76-1471, decided June 12, 1978, slip op. 26. While the court of appeals suggested, without deciding, that it is "doubtful that a court could avoid finding [the record] reflective of agency action arbitrary and capricious" (Pet. App. A, p. 91), that view was based on the court's conclusions concerning the alleged "insufficient [record] evidence of demand for access programs" and the "speculative roots of the present access rules" (*id.* at 86). The standard of judicial review reflected in that approach is contrary to the principles reaffirmed in *National Citizens Committee, supra*, indicating that the substantial evidence test is not applicable to rulemaking of this kind (slip op. 26) and that in such cases "complete factual support in the record for the Commission's judgment or prediction is not possible or required; 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.' *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961)" (*id.* at 36).

The fact that the access rules can be viewed as a limited form of common carriage obligation (see discussion, *infra*, pp. 16-18) that the Commission has not imposed on television broadcasters—and perhaps could not, see 47 U.S.C. 153(h); but cf. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 113, 131—does not place them beyond the Commission's jurisdiction over cable television. For example, this Court in *Midwest Video* noted that the courts of appeals had correctly upheld the Commission's rules requiring cable systems to carry, upon request, the signals of broadcast stations into whose service area they bring competing signals (406 U.S. at 659, n. 17), and which also

2. While the court of appeals purported not to rest its decision on constitutional grounds, its clear expression of the view that the rules are unconstitutional makes it appropriate for this Court to consider the constitutional issues.

Whether the Commission's access rules violate the First Amendment is a question of some difficulty, in light of *Miami Herald Publishing Co.* v. *Tornillo*, *supra*, which held that government can not, under the First Amendment, compel a newspaper to publish the reply of a person whom the newspaper had attacked, even if the newspaper has monopoly power.

As a preliminary matter, however, it should be stressed that the difficult First Amendment questions presented by the access rules are not presented by the channel capacity rules. While the channel capacity rules were adopted in part to provide the capacity to meet access obligations, they also serve significant independent interests in the efficient and orderly development of what this Court in *Southwestern Cable* and *Midwest Video* recognized to be a dynamic industry.[8] Although the requirement that cable systems

impose a limited form of common carrier obligation similar to the obligation imposed here (see also discussion, *infra*, pp. 17-18). As a general matter, moreover, the regulatory means that are appropriate and permissible with respect to the broadcast medium are not necessarily identical to the means appropriate and permissible with respect to cable television.

[8] The channel capacity rules are analogous to requirements that broadcast licensees have certain minimum power capacity or that building permittees provide certain minimum parking

serving large numbers of people meet certain minimum physical capacity requirements does not impose the burden that the court below found constitutionally offensive—divesting the operator of control of what is communicated over his facilities—the court made no distinction between the different kinds of rules involved in declaring them all invalid.

With respect to the access rules themselves, we submit that the court below erred in finding them violative of the First Amendment. While the cable television industry has similarities to a number of other industries—broadcasters, common carriers, public utilities, and newspapers—it also has features that distinguish it from each of those others. Adjudging the constitutionality of a particular rule as applied to cable television requires an analysis of that rule in light of the distinguishing features of the industry.[9]

It is true that cable television is not subject to the physical spectrum limitations on which this Court relied in *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, in upholding

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facilities even though present demand does not require the full use of such capacities.

The equipment availability rules, although in themselves the same kind of physical capacity requirements as the channel capacity rules, are more closely tied to the access rules, since they require the availability of equipment for the use of access users.

[9] As the Court recently stated in *Federal Communications Commission* v. *Pacifica Foundation*, No. 77-528, decided July 3, 1978, slip op. 19: "We have long recognized that each medium presents special First Amendment problems."

the application of the Commission's fairness doctrine and personal attack rules to broadcast licenses. See also *Federal Communications Commission* v. *National Citizens Committee For Broadcasting*, No. 76-1471, decided June 12, 1978, slip op. 22. However, this Court only recently pointed out in *Pacifica Foundation*, *supra*, slip op. 20, that "the reasons for * * * [First Amendment] distinctions [between the broadcast and print media] are complex," rather than related solely to the physical limitations of the broadcast spectrum. From the standpoint of viewers and listeners, the similarities between cablecasting and broadcasting as media of expression all but eclipse the differences. And, for First Amendment purposes, "it is the right of the viewers and listeners, not the right of the broadcasters [or cablecasters], which is paramount." *Red Lion*, *supra*, 395 U.S. at 390.

Moreover, the access rule here is quite different from the statute invalidated in *Miami Herald*. In *Miami Herald* the Court concluded that a statute requiring a newspaper to publish a reply to one of its editorial attacks would not only force the paper to publish something it disagreed with but also would discourage newspapers from taking controversial stands and thus have the result that "political and electoral coverage would be blunted or reduced." 418 U.S. at 257. In contrast, the imposition of access obligations here is entirely unrelated to the content of what the cablecaster otherwise transmits. As the Court said in *National Citizens Committee*, *supra*

(slip op. 24): "Here the regulations are not content related; moreover their purpose is to promote free speech; not to restrict it."

The access rules in effect impose a limited form of common carriage obligation upon cable operators. The obligation imposed is limited because it does not require the operator to dedicate to common carriage any of the channels he is presently using for his own purposes, but only those that are available and unused.[10] It thus preserves his basic freedom to engage in the business of transmitting signals of his choice and does not subject him to full common carriage regulations under Title II, which would include tariff filings, rate regulation, and full dedication of facilities to common carriage.

We may assume that government could not impose even a limited form of common carriage obligation on the print media[11] but that assumption would not necessarily apply to the cable industry. It has never

[10] This is true with the possible exception, noted at p. 4, *supra*, of existing automated services such as time and weather channels, which the Commission in the *1976 Report* stated that it "generally believe[s] * * * should give way to access uses * * *" (Pet. App. B, p. 143, n. 19).

[11] On the other hand, it could reasonably be argued that a state could, for example, require a newspaper to offer its classified advertising services to the public on a non-discriminatory basis. Cf. *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376. Moreover, this Court has expressly held that a newspaper "may not accept or deny advertisements" in furtherance of an attempt to monopolize or restrain trade in violation of the antitrust laws. *Lorain Journal* v. *United States*, 342 U.S. 143, 156.

been doubted that government can impose common carriage obligations on telephone and telegraph carriers and can require them to carry messages that they might prefer not to. There are important similarities between cablecasting and telephone or telegraph carriage.

First, as we have noted, the four dissenting Justices in *Midwest Video* stressed that "CATV is simply a carrier having no more control over the message content than a telephone company" (406 U.S. at 680). While some cablecasters today originate or select some of their programming, the retransmission of broadcast signals or the transmission of programs designed for broadcast elsewhere is still the pervasive characteristic of the industry.

Second, these broadcast-related activities support an expensive system of distribution having the characteristics of a natural monopoly.[12] In contrast to the possibilities that exist in the print media for such devices as direct mailings or dissemination of pamphlets or handbills, there is no practical way to engage

[12] In significant respects a cable system is similar to a public utility; its operations require the placement of wires over or under the public streets involving substantial capital investment similar to that of other natural monopolies. Accordingly, most localities require a cable system to obtain a local government franchise before it can commence operations—an obligation that it is doubtful that a state could impose on a newspaper or magazine. See *Pacifica Foundation, supra*, slip op. 19-20. Indeed, the proposition endorsed by the court below that cable systems are not distinguishable from newspapers for First Amendment purposes would raise serious doubts as to the constitutionality of such local franchising regulations.

in limited or *ad hoc* cablecasting without access to the system.

Finally, the Commission has already imposed upon cable operators common carriage obligations that were before the Court in *Southwestern Cable* and that a plurality of this Court in *Midwest Video* expressly approved—namely the obligation to retransmit upon request the broadcast signals of broadcast licensees serving the same community as the cable system. See 406 U.S. at 659, n. 17. For First Amendment purposes, we see no significant distinction between that kind of common carrier obligation and the access rules approved here.

3. In our view there is no merit in the court of appeals' further suggestion (Pet. App. A, pp. 77-82) that the channel capacity, access and equipment rules constitute an unconstitutional taking of property for public use. While in some cases it may be difficult to draw the line between permissible regulation and an unconstitutional taking, and the question is one of "degree" (see *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415-416),[13] the relatively limited obligations imposed by these rules do not significantly impair the

[13] There Mr. Justice Holmes stated for the Court: "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. * * * [T]his is a question of degree—and therefore cannot be disposed of by general propositions." But see Mr. Justice Brandeis' dissenting opinion, 260 U.S. at 416-422. See also *Penn Central Transportation Co.* v. *City of New York*, No. 77-444, decided June 26, 1978.

operator's abilities to provide his own services and therefore are a regulation falling far short of a taking. This Court recognized as much in upholding the more burdensome mandatory origination rules in *Midwest Video* and rejecting similar arguments in that case. See 406 U.S. at 658, nn. 15 and 16.

4. Finally, we agree with the Commission, for the reasons stated in its petition (Pet. 17-19), that the statutory and constitutional issues presented for review are of substantial importance to the public and to the performance of the Commission's responsibilities.

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted.

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